Supreme Court, U.S.
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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MAURICE HAMILTON,
Petitioner

v.

UNITED STATES OF AMERICA,
Repondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the denial of defense challenges for cause against three court-members who had attorney/client relationships with the prosecutor deprived the petitioner of his right to Due Process under the Fifth Amendment to the Constitution.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Maurice Hamilton, respectfully prays that a writ of certiorari issue to review the order and judgement of the United States Court of Military Appeals entered in his case on September ~~30, 1993.~~ 23, 1994

OPINIONS BELOW

The unpublished opinion of the United States Air Force Court of Military Review [1] is located at Appendix A. The order and judgement of the United States Court of Military Appeals,[2] No. 93-0654, slip op. (C.M.A. 23 September 1994) is located at Appendix B.

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[1] The court has been subsequently renamed the United States Air Force Court of Criminal Appeals.

[2] The court has been subsequently renamed the United States Court of Appeals for the Armed Forces.

JURISDICTION

The final order of the United States Court of Military Appeals was entered on September 23~~29~~, 1994. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1992) and 10 U.S.C.A. § 867(a) (Supp. 1992).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

The petitioner was charged, under five separate specifications, of uttering checks with intent to defraud in violation of Article 123a, U.C.M.J., 10 U.S.C. § 923a. Petitioner entered not guilty pleas and elected trial before a court-martial panel consisting of officer members.

During the voir dire of the court members, it became clear that the Assistant Trial Counsel (hereinafter ATC) had provided legal advice and counselling to no less than three of the seven members on the court. (R. 82-131). Lt Col Smith had obtained tax advice from the ATC relative to his personal finances and a rental property in Texas. (R. 101-103). Captain Davis had similarly received personal legal advice and had formed an opinion about the professionalism and competence of the ATC. (R. 119-120; 128-131). At first, Captain Davis indicated that his contacts with the ATC had been minimal, but later admitted that these contacts had, in fact, been far more involved than he had originally intimated. (*Id.*). Captain Walker had also seen the ATC for legal advice. (R. 122-123). The confidential relationships established between trial counsel and these three clients were so close

that he was not even able to discuss his involvement with his own co-counsel. (R. 126-127).

Trial defense counsel's challenges for cause against all three were denied. (R. 126, 131). Upon denial of the challenge by the military judge, the defense exercised its peremptory challenge against Captain Walker. (R. 138). A defense request for additional peremptory challenges was denied.

REASONS FOR GRANTING THE WRIT

Unlike the Fifth Amendment to the Constitution regarding "presentment or indictment of a Grand Jury," the language of the Sixth Amendment does not expressly exempt the "land or naval forces" from the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed." Nonetheless, the military appellate courts have concluded that "courts-martial have never been considered subject to the jury-trial demands of the Constitution." *United States v. McClain,* 22 M.J. 124, 128 (C.M.A. 1986). Instead, the courts have held that "qualifications for service on courts-martial have been prescribed by Congress in the exercise of its power under Article I, § 8, cl. 14 of the Constitution." *United States v. McClain,* 22 M.J. at 128.

The qualifications established by Congress are set forth in Article 25, U.C.M.J., 10 U.S.C. § 825. Further, the President, pursuant to his powers under Article 36, U.C.M.J., 10 U.S.C. § 836, has promulgated Rule for Courts-Martial 912, which sets forth the procedures for challenging court-martial members. Collectively, these statutory and procedural rules create rights on behalf of service members which are enforceable by the Due Process clause of the Fifth Amendment to the Constitution.

Petitioner had an absolute right to be tried by an impartial panel of members who would resolve his case with a fair and open mind. *United States v. Smart,* 21

M.J. 15 (C.M.A. 1985); *United States v. Davenport,* 17 M.J. 242 (C.M.A. 1984). Court-martial members must be persons whose impartiality is not reasonably open to question and, because an accused in a military court-martial has but one peremptory challenge to exercise, challenges for cause must be liberally granted. *United States v. Glenn,* 25 M.J. 278 (C.M.A. 1987); Art. 41, UCMJ, 10 U.S.C. § 841 (1988). R.C.M. 912 (f)(1)(N) (MCM, Part II, 1984) provides that "[a] member *shall* be excused for cause whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial *free from substantial doubt as to legality, fairness, and impartiality.*" (Emphasis added).

In the instant case, the ATC's pre-existing attorney-client relationships with three of the court members *did* cast substantial doubt on the legality, fairness and impartiality of this trial. The Air Force Court of Military Review, while noting "that all three [court members] had previous attorney-client relationships with assistant trial counsel," held that the military judge did not abuse his discretion in finding that the attorney-client relationships constituted "mere isolated contact." *United States v. Hamilton,* unpub. op. at 3.

Challenges for cause based on the relationship between counsel and a member have been considered before by the military courts. In *United States v. Porter,* 17 M.J. 377 (C.M.A. 1984), defense counsel challenged a member on the grounds that "he has some type of personal relationship with Captain Franke who is the trial counsel here, as he is—Captain Franke is his trial counsel responsible for his squadron and he consults with him, of course, concerning his cases." *Id.* at 379. The member also knew trial counsel because of their joint participation in "Volks Marches and running." *Id.* at 378. The United States Court of Military Appeals, in

affirming the decision of the Army Court of Military Review, held:

> In this case, the assertions against LTC Steele are not of such significance that his positive assurances that they would not affect his impartiality did not suffice to remove any aspect of bias. Indeed, his experiences are of a nature that they might have been experienced by a significant element of the military population (and potential court members). Under such circumstances, we do not choose to extend the concept of implied bias here.

Id. at 379-380. The Court of Military Appeals went on to state that "[w]e do not mean to foreclose entirely the concept of implied bias. *See United States v. Harris,* 13 M.J. 288 (C.M.A. 1982). However, we prefer to reserve the application of that doctrine to those situations where there are implications of fifth or sixth amendment violations." *Id.* at 380.

A professional relationship, such as a member of the legal office providing advice to a commander *as* a commander,[3] is to be expected. Indeed the Court of Military Appeals has found it "very significant that the commander acted only after consulting the local SJA." *United States v. Lopez,* 35 M.J. 35 (C.M.A. 1992). Such activity occurs routinely in order that commanders may carry out their military duty. Such a professional relationship, by itself, is not a fertile ground for challenge. *See e.g., United States v. Lake,* 36 M.J. 317, 322 (C.M.A. 1993) (member a company commander who received legal advice from both trial and defense counsel); *United States v. Ingham,* 36 M.J. 990, 994 (A.C.M.R. 1993) (member a special court-martial convening authority who occasionally received legal advice from the trial counsel).

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[3] The term "commander" is not meant to imply that only commanders have professional relationships with military attorneys. The term is used here solely as an example.

The appearance of fairness in the military justice system is diminished, however, as the relationship moves from the professional to the personal. By addressing the relationship between the members and the ATC in terms of "mere isolated contact," the Air Force Court of Military Review considered only the frequency or duration, and not the scope, of the relationships. For example, viewing the relationship in *Porter, supra,* from the perspective of scope, the relationship arising from participating in Volks Marches and running was shallow regardless of the number of times it occurred. On the opposite end of the "personal relationship" spectrum, the Court of Military Appeals set aside the sentence in a case where one of the court members was the sister-in-law to the deputy staff judge advocate. *United States v. Glenn,* 25 M.J. 278 (C.M.A. 1987). It is the scope of the relationship, not just the frequency or duration, that creates "an appearance of evil." *Harris, supra,* 13 M.J. at 292.

The case *sub judice,* contrary to the opinion expressed by the Court of Military Appeals, is a hybrid situation where both professional and personal interests were involved. While the three members sought the assistance of ATC in his professional capacity as an attorney, that assistance was with regards to personal legal problems. When the counsel who presents the bulk of the prosecution's case and argues the matter to the jury represents those same members in their own legal matters, the obvious perception is that appellant is facing a "stacked deck."

It can hardly be gainsaid that the prosecution's response would have been the complete opposite had the jury been comprised of the defense counsel's former clients. This petitioner was tried, convicted and sentenced by the prosecutor's clients. The appearance that the members were unfairly allied with the government cast "substantial doubt as to the legality, fairness and impartiality" of the

court-martial. As the *Harris* court noted, "where circumstances are present which raise 'an appearance of evil' in the eyes of disinterested observers, mere declarations of impartiality, no matter how sincere, are not sufficient by themselves to insure legal propriety." *United States v. Harris*, 13 M.J. at 292.

CONCLUSION

It is fundamentally unfair, and thus a violation of the Due Process Clause of the Fifth Amendment, to subject a service member to trial before a court-martial panel in which 3/7 of the members had entered into attorney/client relationships with the prosecutor. By denying the timely defense challenge for cause against these members, the military judge foreclosed any possibility that the constitutional error could be avoided. For all the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1994

APPENDICES

APPENDIX A

UNITED STATES COURT
OF MILITARY APPEALS

No. 93-0654/AF

CMR No. 28588

UNITED STATES,
Appellee

v.

MAURICE HAMILTON,
Airman Basic, U. S. Air Force,
Appellant

Argued March 17, 1994

Decided Sep. 23, 1994

For Appellant: *Captain Robert E. Watson* (argued); *Colonel Jay L. Cohen* (on brief); *Colonel Terry J. Woodhouse, Lieutenant Colonel Frank J. Spinner, Major George F. May.*

For Appellee: *Captain Jane L. Harless* (argued); *Colonel Jeffery T. Infelise* and *Lieutenant Colonel Thomas E. Schlegel* (on brief); *Colonel Richard L. Purdon* and *Captain Carlos L. McDade.*

Military Judge: Dennis L. Olson

Opinion of the Court

WISS, Judge:

Appellant was tried by a general court-martial composed of officer members at Soesterberg Air Base, The

Netherlands, in January and February 1990. Contrary to his pleas, he was found guilty of five specifications of writing bad checks totalling in excess of $9300, in violation of Article 123a, Uniform Code of Military Justice, 10 USC § 923a. He was sentenced to a dishonorable discharge, confinement for 24 months, and total forfeitures. On May 4, 1990, the convening authority approved the sentence as adjudged. The Court of Military Review affirmed in an unpublished opinion.

This Court granted review on the following issues:

I

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY DENYING APPELLANT'S CHALLENGES FOR CAUSE AGAINST THREE COURT MEMBERS WHO HAD ATTORNEY/CLIENT RELATIONSHIPS WITH THE ASSISTANT TRIAL COUNSEL.

II

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY DENYING TRIAL DEFENSE COUNSEL'S MOTION FOR MISTRIAL OR MOTION TO DISQUALIFY ASSISTANT TRIAL COUNSEL.

We hold that the military judge did not abuse his discretion in denying defense challenges for cause against three members who had been past legal assistance clients of the assistant trial counsel. Similarly, we hold that the judge did not abuse his discretion in denying defense motions for a mistrial and disqualification of the assistant trial counsel who had an innocuous social conversation with the court president, as the judge granted a defense challenge for cause and removed the officer from the panel.

During *voir dire,* three members voluntarily disclosed that Captain Copley, the assistant trial counsel, had provided legal assistance to them. Lieutenant Colonel (Lt Col) Smith stated that Captain Copley had provided him income tax advice regarding his personal finances and rental property. Captain Davis stated that assistant trial counsel had provided him legal assistance twice—drafting a will and assisting with a personal matter concerning some stateside correspondence relating to Captain Davis and his wife. Captain Walker apparently had the most professional contact with Captain Copley. Captain Copley had written a letter relating to Captain Walker's state tax problem. Additionally, Captain Copley had advised Captain Walker on command military justice matters, but none of the cases had involved financial irresponsibility or bad-check offenses.

Each member freely disclosed these matters in response to initial questions by trial counsel and brief follow-up questions by the defense. As each matter of legal assistance had been complete, none of the members had a continuing attorney-client relationship with assistant trial counsel. Additionally, each member asserted that any contact with assistant trial counsel did not cause the member to view him as more "believable" or to "look more favorably" on the prosecution.

Trial defense counsel challenged these three members for cause "because of legal assistance provided them by Captain Copley. . . ." Appellant asserted these members' entrusting legal assistance matters to Captain Copley would cause them to give assistant trial counsel's argument "more credence."

Initially, the military judge denied the defense challenge for cause, finding no "grounds for disqualification based on the mere isolated contact they've had with assistant trial counsel." However, at the request of trial counsel, the military judge recalled Captain Davis. At this point Captain Davis disclosed that when assistant trial

counsel had been the base tax advisor, Captain Davis' wife had "worked as one of the tax assistants," and her work had brought her into contact with Captain Copley. Additionally, Captain Davis disclosed that Captain Copley had provided tax advise to him and his wife regarding a tax audit during the summer of 1988. Captain Davis again stated that there was no continuing attorney client-relationship and that he viewed assistant trial counsel "as a competent attorney." He reaffirmed that he did not view assistant trial counsel as more believable and would not favor the prosecution.

At this point the military judge again found that Captain Davis was neither biased nor prejudiced in favor of assistant trial counsel and denied the defense challenge. The defense then exercised a peremptory challenge against Captain Walker; however, the military judge refused to grant the defense additional peremptory challenges. The trial began but a later development required the judge again to address another but unrelated issue regarding the court-martial service of the original president of the court.

On January 31, 1990, shortly before the conclusion of the defense case on the merits, the court recessed for the evening. During the overnight recess, assistant trial counsel went to the officer's club where he met Captain Marlow, a reserve officer attached to the base legal office. The two lawyers conversed with the base commander, LtCol Smith, about legal matters unrelated to appellant's case. At some point, LtCol Modica, the president of appellant's court-martial, entered the club and sat at the bar near assistant trial counsel and Captain Marlow. Eventually, Colonel Smith, Captain Marlow, and assistant trial counsel engaged Colonel Modica in conversation that lasted between one to one and one-half hours.

There is no need to detail the full scope of this conversation that eventually covered a variety of legal topics relating to military justice—for example, the duties of a

traveling circuit counsel, licensing procedures for lawyers, and legal ethics, including defense counsel's ethical obligation when representing a client that counsel knows is guilty. At one point Captain Marlow mentioned the movie, "And Justice for All," wherein a lawyer "declare[d] in court that his client was guilty," as an example of a lawyer's breach of client confidences that could "lead to disciplinary action against" the lawyer. Appellant's court martial was not mentioned except for the duty stations of the lawyers assigned to the case and the fact that LtCol Smith's wife was serving as a court member. There was no discussion about other courts-martial or other trials. Although assistant trial counsel was a limited participant in the conservation, after about an hour, he became "uncomfortable" with the conversation discussing attorneys and left the club.

On the morning of February 1, 1990, assistant trial counsel brought these matters to the attention of trial counsel. Trial counsel immediately invited the military judge's attention to "a potential matter involving the president of the court and . . . some conversations he may have had last night." The military judge convened a session under Article 39(a), UCMJ, 10 USC § 839(a), to explore this matter and to develop the factual predicate on the record. Assistant trial counsel and Captain Marlow each testified about their conversation with LtCol Modica. Finally, the military judge and both counsel conducted *voir dire* of LtCol Modica on the matter.

At the conclusion of the testimony, defense counsel presented three independent and consecutive motions. First, the defense moved for a mistrial. The military judge denied this motion, stating simply that there was no showing of "a manifest injustice committed" in the proceedings. Second, defense counsel moved to disqualify the assistant trial counsel from further participation in this case because of his conversation with LtCol Modica.

Defense counsel asserted that the defense specifically desired LtCol Modica to remain on the panel. The military judge denied this motion, also stating there was no "grounds for disqualification" of assistant trial counsel. Finally, the defense challenged LtCol Modica for cause, asserting the conversation that included legal ethics tainted the court president and created an appearance of impropriety. Arguing that the events did not present grounds for a causal challenge, trial counsel, nonetheless, requested the judge to grant the challenge "in an abundance of caution . . . ." Relying heavily on the government request, the military judge granted the challenge for cause, notwithstanding his finding no improper communication between assistant trial counsel and the president of the court. The case then proceeded to its conclusion.[1]

The Court of Military Review concluded that the military judge did not abuse his discretion in denying three and granting only one of the defense challenges for cause and in denying the motion for a mistrial. Unpub. op. at 4. However, the court did "urge counsel to be vigilant in their efforts to avoid social contact with court members while a court-martial is in progress. . . ." Unpub. op. at 4 n*. We agree with the Court of Military Review's decision and its sound admonition to counsel concerning social contact with court members.

DISCUSSION

When a litigant challenges a member for cause on the general ground of "having the court-martial free from substantial doubt as to legality, fairness, and impartiality," pursuant to RCM 912(f)(1)(N), Manual for

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[1] With Lieutenant Colonel Modica excused, Lieutenant Colonel Smith, the spouse of the base commander, became the president of the court. As the base commander was not involved in appellant's chain of command or in any way with this court-martial, both counsel declined the opportunity to *voir dire* LtCol Smith, and there was no objection to her serving as president.

Courts-Martial, United States, 1984, the test for member disqualification is "whether the member's personal bias is such that it will not yield to the evidence presented and the judge's instructions." *United States v. Reynolds,* 23 MJ 292, 294 (CMA 1987). The burden of maintaining the challenge belongs to the challenging party. RCM 912(f)(3). Based in part on considerations of the convening authority's power to select members and each party's having only a single peremptory challenge, this Court has consistently applied the rule that challenges for cause should be granted liberally. *United States v. Glenn,* 25 MJ 278, 279 (CMA 1987). This Court has repeatedly stated a *clear-abuse-of-discretion-standard* when reviewing a military judge's denial of a challenge for cause. *E.g., United States v. White,* 36 MJ 284, 287 (CMA 1993); *United States v. Reynolds, supra.* This position is consistent with the federal practice. S. Childress and M. Davis, *Feedral Standards of Review* § 4.09 at 4-63 (1992). The Supreme Court has stated:

> The findings of the trial court upon that issue [challenges to jury] ought not to be set aside by a reviewing court, unless the error is apparent . . . . It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the "conscience or discretion" of the court.

Reynolds v. United States, 98 U.S. 145, 156 (1879). Therefore, the military judge has broad discretion in this matter, and this Court "will not overturn the military judge's determination not to grant a challenge except for a clear abuse of discretion in applying the liberal-grant mandate." 36 MJ at 287.

Applying this standard here, the military judge's ruling denying the challenges for cause was not an abuse of

discretion. The three members disclosed that they knew the assistant trial counsel because he had provided legal assistance to them. This professional relationship does not constitute a *per se* ground for challenge. *See United States v. Lake,* 36 MJ 317 (CMA 1993); *United States v. Porter,* 17 MJ 377 (CMA 1984). Moreover, each member's association was further attenuated because the member did not have a personal relationship with assistant trial counsel. All members presented positive assurances that their contact did not cause them to look more favorably on the prosecution. While these claims of impartiality are not conclusive, they nonetheless can carry weight. *United States v. Nigro,* 28 MJ 415, 418 (CMA 1989); *United States v. Heriot,* 21 MJ 11 (CMA 1985). As appellant failed to carry his burden of maintaining the challenge for cause, the military judge could properly deny them. *See States v. Johnson,* 31 MJ 117 (CMA 1990).

Similarly, the military judge did not abuse his discretion in denying the defense motion for a mistrial following assistant trial counsel's social conversation with the president of the court. As we have stated:

> "Declaration of a mistrial is a drastic remedy, and such relief will be granted only to prevent a manifest injustice against the accused." *United States v. Rushatz,* 31 MJ 450, 456 (CMA 1990). It is appropriate only "whenever circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial." *United States v. Waldron,* 15 USCMA 628, 631, 36 CMR 126, 129 (1966). The military judge's decision regarding motions for a mistrial will be measured for abuse of discretion.

United States v. Dancy, 38 MJ 1, 6 (CMA 1993). The Supreme Court has stated:

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a

> juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the courts and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer v. United States, 347 U.S. 227, 229 (1954). Our Court immediately and expressly applied this principle and stated, "The presumption must be rebutted by a 'clear and positive showing' that the improper communication from a third person or witness did not and could not operate in any way to influence the decision." *United States v. Adamiak,* 4 USCMA 412, 418, 15 CMR 412, 418 (1954). More recently, this Court reaffirmed this standard. *United States v. Elmore,* 33 MJ 387, 393-94 (CMA 1991), *cert. denied,* 112 S.Ct. 1938 (1992). Ultimately, the judge determines whether the Government has rebutted the presumption of prejudice. *United States v. Adamiak, supra.*

Of course, prohibiting private communication or contact with a member applies to legal counsel. Ethical standards state that it is unprofessional conduct for a counsel to communicate privately with a member concerning a case prior to or during trial except as permitted by law. *See, e.g.,* Rule 3.5(b), ABA Model Rules of Professional Conduct (1989);[2] Standard 3-5.4(a), ABA Standards for Criminal Justice: The Prosecution Function at 3-78 (1986); Standard 4-7.3(a), ABA Standards for Criminal Justice: The Defense Function at 4-83

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[2] This Court has adopted the Model Rules for its bar. Rule 15(a), Rules of Practice and Procedure, United States Court of Military Appeals, 38 MJ LXXXII.

(1986).[3] A variety of courts have condemned improper communication by a counsel with a juror. *See e.g., United States v. Jean,* 25 F.3d 588 (7th Cir. 1994); *Garden Grove School District of Orange County v. Hendler,* 403 P.2d 721, 723-24 (Cal. 1965); *Hutchins v. State,* 140 Ind. 78, 39 NE 243 (1894).

Recognizing that assistant trial counsel's conversation with the senior member was not "about the matter pending before the" court and, therefore, did not violate the letter of law, it was contrary to the spirit of both legal and ethical prohibitions against improper contact with a member.[4] This Court has repeatedly recognized unavoidability of inadvertent contact with members in the normal course of military life. *See, e.g., United States v. Adamiak* and *United States v. Elmore*, both *supra.* Here, however, it was not the fact of the contact but its duration for over 1 hour and content that included general

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[3] At the time of appellant's trial Air Force regulations adopted the ABA Standards for Criminal Justice and the 1969 ABA Code (as revised) of Professional Responsibility, including the disciplinary rules, subject to consistency with the Uniform Code of Military Justice and the Manual for Courts-Martial, United States, 1984 and applicable directives. Paras. 1-6 and 8-8, Air Force Regulation (AFR) 111-1, Military Justice Guide (Change 2, 12 July 1989). Air Force TJAG Policy Letter 26 of October 22, 1992, contains the current Rules of Professional Responsibility and USAF Standards for the Administration of Criminal Justice. Rule 3.5 of these Air Force Rules, with terminology modified to be consistent with Air Force practice, is the same as Rule 3.5 of the ABA Model Rules of Professional Conduct (1989).

[4] The operative disciplinary rule, DR 7-108(B), of the ABA Code of Professional Responsibility, states in part:

During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.

This rule was made applicable to Air Force lawyers pursuant to paragraph 8-8, AFR 111-1, Military Justice Guide (Change 2, 12 July 1989).

legal and military justice matters that plainly make this conversation improper.

We must therefore look to the record to determine if the Government carried its burden to make "a 'clear and positive showing' that the improper communication from a third person or witness did not and could not operate in any way to influence the decision." *United States v. Adamiak* and *United States v. Elmore*, both *supra* (—— MJ at (*11*)). We evaluate this issue in light of the entire record to determine whether the error deprived the defendant of a fair trial. *See Smith v. Phillips*, 455 U.S. 209 (1982); *United States v. Jean, supra.* In looking to the entire record, we consider the nature and seriousness of the prosecutorial misconduct, any curative actions taken by the court, and the weight of the evidence against the accused. *See United States v. Simmons*, 38 MJ 376 (CMA 1993), and *United States v. Jean, supra.*

Even though improper, the contact was neither intentional nor egregious. Moreover, the prompt and responsible action by trial counsel and the military judge insured a complete record of this matter. *Cf. United States v. Martinez*, 40 MJ 82, 83 (CMA 1994) (reversible error for military judge's failure to make a record of the improper *ex parte* communication with a third-person).

Following assistant trial counsel's reporting the improper contact and communication to trial counsel who promptly presented this matter to the military judge, the military judge permitted a full inquiry into the matter. Importantly, this inquiry established that assistant trial counsel's improper but inadvertent contact did not prejudice appellant or taint the proceedings. No information regarding appellant's case was discussed. We do not view identification of the duty station of the counsel in the case as a significant matter. Also, the military judge took remedial action to remove even an appearance of impropriety when the judge granted the defense challenge for

cause and excused LtCol Modica. Viewing the record of the communication and the remedial action taken by the military judge, we are confident that the presumption of prejudice is overcome by "a 'clear and positive showing' that the improper communication" did not in any way influence or affect the fairness of the trial. The military judge did not abuse his discretion in denying appellant's motion for a mistrial.

We must briefly address the judge's decision not to disqualify assistant trial defense counsel. RCM 901 (d)(3) vests the military judge with authority to decide whether a counsel may be disqualified. According to the Discussion to that Rule: "Counsel may be disqualified because of lack of necesary qualifications, or because of duties or actions which are inconsistent with the role of counsel. If it appears that any counsel may be disqualified, the military judge should conduct an inquiry or hearing." This provision is a continuance of the long-standing rule that misconduct is a basis for disqualification. *See* para. 44b, Manual for Courts-Martial, United States, 1951. In strict compliance with RCM 901(d)(3), the military judge created a record of this matter. For reasons previously cited, most significantly the inadvertent nature of this social contact and the absence of discussion regarding appellant's case, we conclude the judge did not abuse his discretion in denying the defense motion to disqualify assistant trial counsel.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, CRAWFORD, and GIERKE concur.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 28588

17 December 1992

UNITED STATES

v.

Airman Basic MAURICE HAMILTON,
FR410-13-2311
United States Air Force

Sentence adjudged 2 February 1990 by GCM convened at Soesterberg Air Base, the Netherlands. Military Judge: Dennis L. Olson.

Approved sentence: Dishonorable discharge, confinement for 24 months, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Captain Michael D. Burt.

Appellate Counsel for the United States: Colonel Joe R. Lamport, Colonel Robert E. Giovagnoni, Lieutenant Colonel Brenda J. Hollis, and Captain David G. Nix.

Before
DIXON, McLAUTHLIN, and HEIMBURG
Appellate Military Judges

OPINION OF THE COURT

DIXON, Chief Judge

Contrary to his pleas, appellant was convicted of five specifications of writing bad checks totaling in excess of $9300. He was sentenced by a general court-martial with members to a dishonorable discharge, confinement for 24 months, and total forfeitures. The convening authority approved the sentence as adjudged.

Appellant assigns three errors on appeal. He contends the evidence was factually insufficient to convict. He also asserts the military judge erred by refusing to compel testimony by the trial counsel, by denying three challenges for cause, by denying the defense motion for mistrial, and by denying a defense motion in limine. Finally, he contends the sentence adjudged was too severe. Finding no basis for relief on any of the assigned errors, we affirm.

Appellant is a 28-year-old, single airman basic with over 7 years of active service. In 1988, he was convicted by a special court-martial for disobeying an order to provide a urine sample. In addition, he received two nonjudicial punishment actions during 1988, one for dereliction of duty by falling asleep on his job and the other for failing to go.

I. FACTUAL SUFFICIENCY

Between 12 September 1988 and 11 October 1988, while stationed at Soesterberg Air Base in the Netherlands, appellant negotiated 12 checks to Merchants National Bank drawn on the Adrian State Bank of Adrian, Michigan, in the amount of $5800. All 12 checks, when presented for payment, were returned for insufficient funds. During this same period, he also negotiated to Merchants National Bank seven drafts drawn upon the Lenco Ed Credit Union in the amount of $3500. All seven drafts, when presented for payment, were returned because the

account was closed. Seven times during this check writing spree, appellant cashed a $500 dollar check drawn on the Adrian State Bank and a $500 draft drawn on Lenco Ed Credit Union on the same day. Thereafter on 11 November 1988, appellant negotiated a check to Army, Air Force Exchange Service (AAFES) Europe in the amount of $80 drawn on the Adrian State Bank of Adrian, Michigan. Upon presentment, this check was also returned due to a closed account. Appellant failed to make any restitution within 5 days of being notified the checks and drafts mentioned above were returned for nonpayment.

Appellant contends the evidence is insufficient to convict because he believed he had an arrangement with Adrian State Bank and Lenco Ed Credit Union to extend credit covering him if the accounts were overdrawn. The assistant manager of Lenco Ed Credit Union testified he had previously agreed to cover some of the appellant's outstanding checks, but had instructed him not to write any more checks. He rejected any suggestion that the Credit Union agreed to cover the checks in question. Similarly, an assistant vice president of Adrian State Bank testified they had previously honored some checks written by appellant despite a negative balance when there had been problems with funds transfers. She testified the bank had only received money order deposits from appellant totaling $1400, an amount far short of what was required to cover the numerous checks presented for payment. The bank was forced to close appellant's account. A review of the evidence belies any claim that appellant had an ongoing credit arrangement to cover the checks written or that he had made arrangements to ensure an adequate amount was deposited to cover the outstanding checks. We are convinced that the evidence presented at trial is factually sufficient to sustain appellant's conviction. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

II. TRIAL COUNSEL AS DEFENSE WITNESS

Appellant contends the military judge erred by denying the defense request to have the assistant trial counsel testify concerning the extent of his participation in the investigation conducted by Air Force Office of Special Investigation (AFOSI) to ascertain what money orders appellant may have purchased from American Express. Part of appellant's defense was that American Express money orders were sent to maintain his accounts. Assistant trial counsel accompanied an AFOSI agent on a visit to the American Express office and helped compile a list of money orders sold during a 4-month period. Although the investigation failed to discover the money orders appellant claimed to have purchased, all of the money orders that office issued were not researched. The investigation was terminated when American Express advised it would cost around $2000 to search all their records. After excusing the members and listening to assistant trial counsel's testimony concerning his involvement, the military judge was not persuaded that his testimony was crucial to appellant's defense. Moreover, the appellant failed to show why the OSI agent could not provide the same information. Accordingly, the judge denied the defense request to have the assistant trial counsel called as a witness. The right to call witnesses is not unlimited. R.C.M. 703 gives each party the right to call only those witnesses that are relevant and necessary. We find no prejudice to appellant in the military judge's refusal to compel assistant trial counsel's testimony. Mil. R. Evid. 103.

III. CHALLENGES FOR CAUSE

Following an extensive voir dire, appellant challenged three of the court members based upon revelations that all three had previous attorney-client relationships with assistant trial counsel through the rendering of personal legal assistance. One member had consulted assistant trial counsel to obtain tax advice relative to his personal

finances and rental property. Another obtained a will from assistant trial counsel and consulted with him about a letter his wife received from the states. The third consulted assistant trial counsel about a state tax matter and assistant trial counsel had written a letter for him. None of these court members had a continuing attorney-client relationship with assistant trial counsel and each stated that the prior associations would not have any effect on them in their role as court members. The military judge denied each of the challenges for cause, finding that the mere isolated contact each of them had with assistant trial counsel was not grounds for disqualification. *See* R.C.M. 912(f)(1). The military judge's determination is entitled to great deference and will not be reversed absent an abuse of discretion. *United States v. Jobson,* 31 M.J. 117 (C.M.A. 1990); *United States v. Nigro,* 28 M.J. 415 (C.M.A. 1989); *United States v. Reynolds,* 23 M.J. 292 (C.M.A. 1987); *United States v. Sloan,* 30 M.J. 741 (A.F.C.M.R. 1990). We find no abuse of discretion.

IV. MOTION FOR MISTRIAL

Appellant moved for a mistrial following disclosure that assistant trial counsel engaged in social conversations with the president of the court-martial during an overnight recess. After trial proceedings concluded on 31 January 1990, assistant trial counsel went to the officer's club with a reserve officer attached to the Soesterberg base legal office. While there, the reserve officer struck up a conversation with the president of the court lasting between 1½ and 2 hours. The conversation initially dealt with environmental subjects but eventually covered a variety of topics, including the duties of a travelling circuit counsel, licensing procedures for lawyers and legal ethics. They also discussed a defense counsel's ethical obligations when representing a client known to be guilty. Also present during this occasion was the base commander, who was the husband of another member of the court. The court-martial was not mentioned during the discussions in

any way. Although assistant trial counsel was present during a major portion of the discussions, his participation was limited.

The military judge denied the motion for a mistrial as well as a motion to disqualify the assistant trial counsel. He did, however, grant a defense motion to excuse the president of the court. We agree with the military judge that the facts, as presented, did not establish that a manifest injustice was committed.* Accordingly, we find the denial of the mistrial motion was not an abuse of discretion. *United States v. Rushatz,* 31 M.J. 450 (C.M.A. 1990); *United States v. Rebuck,* 16 M.J. 555 (A.F.C.M.R. 1983).

V. MOTION IN LIMINE

At trial, appellant made a motion in limine in an attempt to exclude evidence of his prior conviction as well as any reference to his confinement resulting from that conviction. The government argued the evidence which appellant sought to exclude was relevant on the issue of whether there was an intent to defraud. They intended to present evidence that appellant was in post-trial confinement at Mannheim when some of the checks were returned and one of the checks in question was written while appellant was TDY to Hahn to visit with his first trial defense counsel. The military judge agreed these

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*** Nevertheless, we urge counsel to be vigilant in their efforts to avoid social contact with court members while a court-martial is in progress. Although purely social contact like that which occurred in this case will normally not be grounds for mistrial, such contact can create an appearance of impropriety. Not surprisingly, we most often see this appearance problem arising at the Officers' Club. We recognize the important role that officers' clubs play in the social life of Air Force officers at many installations and understand casual contacts at club activities are often unavoidable. However, we believe it is the responsibility of counsel to avoid the type of extended contact that occurred in this instance.**

facts provided a relevant factual framework for the court members' assessment of the charges. Accordingly, he denied the motion in limine. However, he did prohibit the government from disclosing the specific charges which resulted in appellant's prior conviction. In making his ruling, the military judge applied the R.C.M. 403 balancing test and determined the probative value was not outweighed by its prejudicial effect. We find he did not abuse his discretion. Mil. R. Evid. 404(b), *United States v. Hicks,* 24 M.J. 3 (C.M.A. 1987); *United States v. Thomas,* 11 M. J. 388 (C.M.A. 1981).

VI. CONCLUSION

Having examined the record of trial, the assigned errors, and the government's reply thereto, we conclude the findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

Senior Judge McLAUTHLIN concurs.

Judge HEIMBURG did not participate.

[SEAL]

OFFICIAL

/s/ Naomi D. Allen
NAOMI D. ALLEN
TSgt, USAF
Chief Court Administrator, AFCMR

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